UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNDER ARMOUR, INC.,
Petitioner,

v.

ATHALONZ, LLC,
Patent Owner.

Case IPR2024-00637
Patent No. 11,013,291

PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE

I. Exhibits 1032 and 1033

As explained in the Motion, Exhibits 1032 and 1033 are purported dictionary definitions of the terms "cross section" and "perspective," but in fact are nothing more than website printouts that have not been authenticated by any witness and lack key indicia of authenticity such as publication and bibliographic information. Paper 29, 2-3. Petitioner's authority confirms that they should be excluded. For example, in *Trend Micro Inc. v. Cupp Computing AS*, the Board explained that in evaluating the authenticity of publications, the Board looks to whether the "references bear conventional markers of publication, including copyright dates, publication by commercial publishers or recognized manufacturers, assignment of ISBN numbers, printed dates, and library stamps." IPR2019-00767, Paper 32, 11 (P.T.A.B. Aug. 25, 2020) (internal citations omitted); *Hulu, LLC, v. Sound View Innovations, Inc.*, IPR2018-01039, Paper 29, 17–18 (P.T.A.B. Dec. 20, 2019) (discussing a similar inquiry). Here, none of those "conventional markers" are present.

As to hearsay, Petitioner never actually explains why the challenged exhibits are (allegedly) not hearsay or identifies any hearsay exception. Instead, Petitioner engages in misdirection by focusing on the broader question of the admissibility of dictionary definitions—and then cites a number of cases in which admissibility was never challenged. But whether properly authenticated dictionary definitions can be admissible for non-hearsay purposes under some circumstances is not at issue. The

issue is whether the specific exhibits Petitioner provided are admissible for the cited purpose and here Petitioner has failed to rebut Patent Owner's argument that they are not.

Finally, the Board should not accept Petitioner's invitation to admit otherwise inadmissible documents merely because Petitioner's expert, without any analysis or evaluation, cited them in a reply declaration. Petitioner has not shown that it was reasonable for Mr. Delgatty to rely on an unauthenticated alleged dictionary definition. At minimum, the Board should determine, as the CTPG suggested is frequently the case, that consideration of Exhibits 1032 and 1033 are "is unnecessary to resolve the patentability of the challenged claims." CTPG, 80.

II. Exhibit 1034

As explained in the Motion, Exhibit 1034 is allegedly a "compil[ation]" of "the PGA tour's official stats" that Petitioner cited in an attempt to rebut Patent Owner's secondary considerations evidence. Paper 29, 4-5 (quoting Paper 15, 29-30); *see also* EX1022 ¶54 (citing Exhibit 1034 without saying what it is). But, as is further explained in the Motion, Exhibit 1034 is merely an unlabeled table of data with no specific sourcing information whose contents are never described by any witness, that contains no information about who prepared it, and that lacks any indicia of authenticity.

In its opposition, Petitioner begins with an obviously improper attempt to bolster its exhibit by citing alleged source information that Petitioner never previously provided. Petitioner had ten business days to provide supplemental information in response to Patent Owner's timely objection to Exhibit 1034 and failed to do so. 37 CFR § 42.64(b)(2). It cannot do so now. *See Parse Biosciences, Inc. v. 10x Genomics, Inc.,* IPR2023-00958, Paper 48, 19 (P.T.A.B. February 3, 2025) (excluding late submitted supplemental declaration because "Petitioner clearly missed the deadline imposed by 37 C.F.R. § 42.64(b)(2), which was triggered by Patent Owner's [timely] objection").

Petitioner next latches on to Mr. Delgatty's citation of Exhibit 1034. Paper 30, 8. But Mr. Delgatty never said what the exhibit was or analyzed it in any way—instead he simply repeated his "understand[ing]" of how Mr. Langer's statistics allegedly changed, and cited EX1034 without comment. EX1022 ¶54 ("I ***understand*** that Mr. Langer's performance got worse, not better, after switching to Athalonz's products (see EX1034)…" (emphasis added)). Authentication requires "evidence sufficient to support a finding that the item is what the proponent claims it is," FRE 901(a), such as "testimony that an item is what it is claimed to be," FRE 901(b)(1). Mr. Delgatty's testimony does neither.

Further, Petitioner provides no evidence to support its conclusory assertion that Exhibit 1034 "contains data that an expert would reasonably rely on in

evaluating the opinion of Athalonz's expert that Mr. Langer 'hit the ball better' when he switched to Athalonz golf shoes." Paper 30, 8. "The burden to establish reasonable reliance is on the proponent of challenged expert testimony," and "a determination of reasonable reliance" requires a judge to "conduct an independent an independent evaluation into reasonableness." *Wi-LAN Inc. v. Sharp Elecs. Corp.,* 992 F.3d 1366, 1376 (Fed. Cir. 2021). Here, Petitioner has not given the Board enough information to even begin such an inquiry. For example, Mr. Delgatty does not opine that it would be reasonable for an expert to rely on EX1034 in his declaration—to the contrary, as Patent Owner explained in its sur-reply, he has no expertise to be discussing the exhibit at all. *See* Paper 23, 25. And the Federal Circuit has expressly rejected expert reliance on unauthenticated documents and "conclusory statement[s]" regarding reasonable reliance—exactly what Petitioner provides here. *Id.*, ("But Wi-LAN has not made a showing that source code experts reasonably rely on ***unauthenticated*** source code printouts…***Wi-LAN's conclusory statement*** that 'the declarations and source code evidence are the type of information that an expert 'would reasonably rely on in forming an opinion' under FRE 703' ***is not sufficient***. (cleaned up, emphasis added)).

Finally, Petitioner does not dispute that Exhibit 1032 is hearsay. Its policy-type argument regarding the importance of cross-examination is (1) a legally insufficient rebuttal to the multiple evidentiary defects Patent Owner identified and

(2) only underscores why exclusion is appropriate here—Petitioner never provided a witness knowledgeable regarding Exhibit 1032 that Patent Owner could cross examine. The exhibit should be excluded.

Dated: June 11, 2025

Respectfully submitted,

/Connor Houghton/
Connor Houghton
Counsel for Patent Owner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned certifies that on June 11, 2025 a copy of the foregoing document was served by email upon the following:

Frank C. Cimino (Reg. No. 39,945)
FCCimino@Venable.com
VENABLE LLP
600 Massachusetts Ave., NW
Washington, DC 20001
T 202-344-4569 / F 202-344-8300

Megan S. Woodworth (Reg. No. 53,655)
MSWoodworth@Venable.com
VENABLE LLP
600 Massachusetts Ave., NW
Washington, DC 20001
T 202-344-4507 / F 202-344-8300

Justin J. Oliver (Reg. No. 44,986)
JJOliver@Venable.com
VENABLE LLP
600 Massachusetts Ave., NW
Washington, DC 20001
T 202-721-5423 / F 202-344-8300

Robert E. Bugg (Reg. No. 65,949)
REBugg@Venable.com
VENABLE LLP
151 West 42nd Street 49th Floor
New York, NY 10036
T 212-370-6241 / F 212-307-5598

Dated: June 11, 2025

/Connor Houghton/
Connor Houghton